STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of General Sessions
The Honorable Edward Miller, Circuit Court Judge

Appellate Case No. 2025-000718

THE STATE,

Respondent,

v.

TOBY KHAN ARMSTRONG,

Appellant.

INITIAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF THE ISSUES ON APPEAL

I. Whether the trial court properly admitted testimony about the circumstances under which Victim disclosed that she had been raped.

II. Whether the trial court properly refused to grant a mistrial based on two instances of alleged prior bad act testimony involving (1) the words Armstrong spoke to Victim while he raped her and (2) evidence that Armstrong and Victim's mother broke up when he "went to jail."

STATEMENT OF THE CASE

A Greenville County grand jury indicted Appellant Toby Armstrong for criminal sexual conduct with a minor in the first degree. Armstrong proceeded to trial on April 7–9, 2025, before the Honorable Edward W. Miller, Circuit Court Judge. Armstrong was convicted and sentenced to 35 years' incarceration. Tr.p.304–09. This direct appeal follows.

STATEMENT OF FACTS

Victim, 21 years old at the time of trial, testified that when she was 10, her mother's boyfriend, Toby Armstrong, sexually assaulted her in her mother's bed. It was late at night, and Mother was at work. Victim testified Armstrong started massaging her back in the living room, then instructed her to come with him into Mother's bedroom. Tr.p.70. He then "flipped her over" and "pulled [her] pants down." Tr.p.71. Victim asked Armstrong what he was doing, and he responded he "was going to do to [Victim] what he does to [her] sister." Tr.p.71. Armstrong seemed intoxicated. Tr.p.76. Armstrong "tried to put his fingers in [Victim]," which "hurt really bad." Tr.p.72–73. Victim testified: "I asked him what he was doing, and I was crying, and I asked him to stop. And he told me that, if I screamed or yelled, that he would kill my whole family." Tr.p.73. Armstong tried to put his penis inside of Victim, but it "wouldn't go in." Tr.p.73. Victim testified it hurt "tremendously." Victim "begged him to stop," and Armstrong put a pillow over her face when she tried to yell. Tr.p.74. Armstrong finally stopped when Victim told him she "wouldn't tell anyone and that God would forgive him for what he did." Tr.p.75. Victim then went to the bathroom and "begged God to kill" her. Tr.p.76.

Victim disclosed the abuse to multiple people. Victim disclosed to one of her sisters the day after it happened. Tr.p.132. Sister confronted Armstrong, and Armstrong apologized to Victim, saying he must have been drunk. Tr.p.134–36; p.79. Armstrong impregnated Sister three years later, when Sister was 16. Tr.p.130. Victim's high school boyfriend testified Victim disclosed to him that she

had been raped at age 10. Tr.p.103. He testified Victim had panic attacks when they became intimate. Tr.p.105–06. In 2020, Victim disclosed the abuse to her great-aunt and her husband. Tr.p.52–53; p.99. They called police, which led to this prosecution.

ARGUMENT

I. The trial court properly admitted outcry evidence about the circumstances of Victim's disclosure.

The trial court correctly admitted "outcry" evidence about the circumstances of Victim's disclosure of abuse to her great-aunt. Great-Aunt was one of four outcry witnesses, and the only one whose testimony Armstrong objected to. There was no basis for the objection, as it is well settled that witnesses may testify to the circumstances of a rape victim's disclosure of abuse, as long as the details are limited to the "time and place" the rape occurred. This Court should affirm.

Standard of review.

The admission of evidence is left to the trial court's sound discretion, and its decision will not be reversed absent an abuse of discretion. State v. Heath, 433 S.C. 506, 513, 860 S.E.2d 673, 676 (Ct. App. 2021). An abuse of discretion occurs when the trial court's ruling is based on an error of law. Id.

Discussion.

"It is well settled that the fact that the prosecutrix complained of a rape may be shown in corroboration of her testimony." State v. Sharpe, 239 S.C. 258, 272, 122 S.E.2d 622, 629 (1961). "The particulars or details are not admissible but so much of the complaint as identifies 'the time and place with that of the one charged' may be shown." Id. (citation omitted). See also Rule 801(d), SCRE ("A statement is not hearsay if . . .[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (D) consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal

sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident . . . .").

Carter's testimony was squarely within the "outcry" rule. The solicitor's direct examination was textbook. After eliciting that Victim lived with Carter during the summer of 2020, the solicitor asked:

> Solicitor: During that time, without saying the name of the perpetrator, did [Victim] ever disclose to you as being a victim of sexual assault?
>
> Carter: Yes, she did.
>
> Solicitor: And was it around that time period?
>
> Carter: Yes. It was December the 10th of 2020.
>
> Solicitor: And where were you when this disclosure took place?
>
> Carter: Sitting in the living room.
>
> Solicitor: Who were you there with?
>
> Carter: My husband. We were sitting together.
>
> Solicitor: And [Victim] was there?
>
> Carter: Yes. She was sitting across from in front of us.
>
> Solicitor: And at the time, again not saying the name of the perpetrator, but did she say when this sexual assault occurred?
>
> Carter: She did not at that time.
>
> Solicitor: At that time she did not? Did she say where it occurred?
>
> Carter: Not at the time, she did not.

Tr.p.52–53. Defense counsel did not object. Carter went on to explain she reported Victim's disclosure to the police. Victim subsequently disclosed that the assault occurred "when she was living with [Carter's] sister," when Victim was 10 years old.

Tr.p.54. The solicitor then asked Carter about Victim's demeanor when she disclosed the sexual assault. Carter responded: "She screamed the loudest scream I've ever heard her scream. And she said, 'He raped me.'" Tr.p.54. Defense counsel objected, without stating the grounds of her objection, and the court sustained the objection.

It is unclear why the trial court sustained the objection. Defense counsel did not state the basis of her objection as required by Rule 103, SCRE. For this reason, this issue is not preserved for appellate review.[1] The issue is also unpreserved for a second reason: Armstrong did not move for a mistrial or request any further relief.[2] Because the court sustained the objection, Armstrong received the relief he requested. There is thus no adverse ruling to review as to this objection. See State v. Parris, 387 S.C. 460, 465, 692 S.E.2d 207, 210 (Ct. App. 2010).

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[1] The rule provides an objection must be specific, unless the basis is apparent from context. The attorneys discussed outcry evidence during Armstrong's motions in limine, so the trial court may have understood this as the basis for the objection. But Armstrong's motion in limine anticipated improper testimony, not the proper outcry testimony that was elicited. Counsel explained she would object to "identity of the perpetrator, the details of the allegation, or anything like that . . ." Tr.p.33. The testimony elicited was nothing of the sort.

[2] Armstrong's assertion that he "timely objected to the inadmissible testimony and requested a mistrial" is not supported by the record. Brief of Appellant at 5. Armstrong did not move for a mistrial based on Carters testimony until after Carter's, and Victim's, testimony had concluded. Tr.p.92. At that time, Armstrong argued Carter's testimony violated Rule 801. At the same time, he memorialized his 404(b) objection to Victim's testimony, an issue he raises on appeal as Issue II. Tr.p.72. That objection prompted a bench conference. There was no bench conference in response to Armstrong's objection to Carter's testimony. Tr.p.54–55. Armstong cannot bootstrap his mistrial argument as to Carter's testimony onto his objection and motion for mistrial as to Victim's testimony. The mistrial motion as to Carter's testimony was not timely, and therefore the argument is not preserved for review.

The solicitor then proceeded with her direct examination:

> Solicitor: Without saying what she said, again my question is demeanor. You said she was crying, is that correct?
>
> Carter: She was crying. She was . . .

Tr.p.54. Defense counsel objected again. This time she gave a basis for the objection: "Same objection as to demeanor as well, Your Honor, under hearsay." The court responded, "She can observe what she saw." Tr.p.54. Thus the trial court seemingly overruled Armstrong's objection to testimony about Victim's "demeanor" during her disclosure. The solicitor continued her direct examination:

> Solicitor: You can answer that question.
>
> Carter: She was crying. And it was a cry that came from the very core of her being. It was so loud. I knew something was wrong.

Tr.p.55.

Regardless of the basis for the trial court's ruling, there was no basis to object to any of this testimony. This was, quite literally, outcry evidence. It would be hard to imagine testimony more firmly within bounds of the rule.

The purpose of outcry evidence is to corroborate a rape victim's allegations through evidence of consistent prior statements. This type of evidence has a "well-established" common law pedigree and is specifically provided for by rule. Dawkins v. State, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001); see also State v. Wallace, 122 S.C. 520, 115 S.E. 811, 811 (1923). As long as the outcry testimony is limited to the time and place of the alleged assault, the testimony is proper.

Carter did not give any testimony which would violate the rule. She did not say anything about the identity of the perpetrator or details about the facts Victim

disclosed. See State v. Cox, 274 S.C. 624, 626, 266 S.E.2d 784, 785 (1980) (explaining witness's testimony that "the prosecuting witness told her that she had been raped" was proper outcry testimony). Her testimony was limited to the fact that Victim disclosed she had been raped, and when and where it occurred.

Armstrong's brief fails to discuss the outcry rule, a foundational, well-established rule of admissibility in rape cases. Instead, he makes a generic "hearsay" argument. The evidence discussed above is firmly within the bounds of the rule.[3]

Finally, Armstrong has not shown prejudice. Armstrong argues Carter's "emphatic and emotional testimony impacted the jury." Brief of Appellant at 6. This is merely a complaint about the probative force of the evidence, not improper corroboration under the hearsay rule. Further, the testimony "he raped me" is nearly identical to the solicitor's prior question to Carter, to which Armstrong did not object, about Victim disclosing that she had been "a victim of sexual assault." Tr.p.52. It is also cumulative to Carter's husband's testimony describing Victim's disclosure. Tr.p.99. Thus any error is harmless. This Court should affirm.

[3] Even though Armstrong has not raised this argument on appeal, there is nothing in the rule that prevents testimony about a victim's demeanor during outcry. On the contrary, evidence of the victim's demeanor during outcry fits squarely within the rationale of the rule. See Wallace.

II. The trial court properly denied Armstrong's motions for mistrial.

The trial court acted within its broad discretion in refusing to grant a mistrial based on witness testimony which referenced Armstrong's alleged prior bad acts. Neither instance presented the "manifest necessity" of a mistrial. This Court should affirm.

Standard of review.

The decision to grant or deny a motion for a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct. App. 1999). This Court favors the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. Id.

Discussion.

Armstrong argues the trial court erred by refusing to grant a mistrial after two instances where a witness testified to facts Armstrong argues constitute bad character evidence. The trial court acted within its broad discretion in finding neither instance rose to the "manifest necessity" of a mistrial. See Patterson, 337 S.C. at 227, 522 S.E.2d at 851 (explaining the "granting of the motion for a mistrial is an extreme measure" which should be taken only in cases of "manifest necessity" where an incident is "so grievous that prejudicial effect can be removed in no other way").

The first instance arose during Victim's testimony, as Victim was describing the rape. She testified: "He pulled my shorts all the way down . . . I asked him what

he was doing. And then he proceeded to tell me that he was going to do to me what he does to my sister." Tr.p.71. Subsequent testimony revealed Armstrong impregnated Victim's middle sister when she was 16 years old, three years after this incident. Tr.p.88–90. Armstrong objected and a bench conference was held. When Victim's testimony concluded, Armstrong put on the record his Rule 404(b) objection and moved for a mistrial, which was denied. The trial court denied the motion for mistrial without ruling on whether the testimony was admissible. Tr.p.93.

Armstrong's statement to Victim while he was raping her is part of the res gestae of the crime because it occurred "contemporaneously with" and was "intimately connected" to the charged offense. State v. Williams, 321 S.C. 455, 462, 469 S.E.2d 49, 53 (1996); see also State v. Slay, 573 So. 2d 1185, 1187 (La. Ct. App. 1991) (explaining statement "made by a rapist during the course of the assault on his victim" was part of res gestae of the crime); State v. Allbritton, 660 S.W.2d 322, 329 (Mo. Ct. App. 1983) (explaining "it would be difficult for the victim to give an adequate and fair account of the occurrence" without admitting rapist's contemporaneous statement); Roddy v. State, 257 N.E.2d 816, 818 (Ind. 1970) ("Res gestae means literally 'things done' and covers words spoken that are so closely connected to the occurrence as to be part of it, namely, 'the whole of the transaction under investigation and every part of it.' . . . 'Where evidence of an act of accused is admissible, his declarations, made at the time, having a tendency to elucidate,

explain, or give character to the act, are a part of the transaction and for that reason admissible, whether exculpatory or incriminatory.'") (citations omitted).

The statement was also admissible under the intent and common scheme or plan exceptions. While the facts surrounding Armstrong's sexual relations with the sister were not developed at trial and therefore would not normally support admissibility under the common scheme or plan exception, Armstrong explicitly connected the events by referencing his sexual relations with sister while he was raping Victim. His prior conduct was in his mind when he expressed his intent to have sexual relations with Victim. Thus, as evidenced by Armstrong's own statement, there is a logical connection between the two events. See State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (2020) (discussing "logical connection" standard). The statement had great probative value.

The testimony did not warrant the "extreme" remedy of mistrial. It was not clear from the Victim's testimony that the "sister" Armstrong referenced was a minor at the time. Victim testified she is the youngest of three sisters. Tr.p.60. Her eldest sister is seven years older. Tr.p.60. This sister would not have been a minor at the time of the rape. Victim did not testify on direct examination that Armstrong subsequently impregnated her middle sister. Armstrong brought that out on cross-examination. Tr.p.88–89. See State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) ("A party cannot complain of an error which his own conduct has induced.").

Armstrong did not request a curative instruction. See Patterson, 337 S.C. at 226, 522 S.E.2d at 850 (explaining "a trial court's curative instruction is considered to cure any error regarding improper testimony"). Given the all-or-nothing choice the trial court was presented with, it acted within its broad discretion in denying the motion for mistrial.

Armstrong further argues the court erred by not declaring a mistrial when Victim's sister testified Armstrong and children's mother broke up when Armstrong "went to jail." The trial court gave a curative instruction following this testimony, instructing the jurors to "disregard the last statement made by this witness about the location of the defendant in this case." Tr.p.130.[4]

The trial court acted within its broad discretion in refusing to declare a mistrial. See State v. Hurell, 424 S.C. 341, 357, 818 S.E.2d 21, 29 (Ct. App. 2018) (affirming denial of mistrial where witness "inadvertently told the jury [defendant] had been in prison"). Sister's testimony did not present the "manifest necessity" of mistrial, and the court properly gave a curative instruction instead. See Patterson, 337 S.C. at 227, 522 S.E.2d at 851 (explaining mistrial should only be granted where an incident is "so grievous that prejudicial effect can be removed in no other way"). The curative instruction is presumed to have cured any prejudice. Id.

[4] Armstrong asserts Sister's testimony violated the trial court's "repeated warnings." This was not exactly what the parties had discussed with the court beforehand. Armstrong sought to exclude evidence that he was currently in prison. The solicitor had raised the issue in order to prevent misleading testimony about Armstrong's custody rights to Sister's child. Tr.p.110–21. The trial court instructed Sister (a single time) not to "mention anything about him being in prison." Tr.p.121.

Further, Armstrong volunteered on cross-examination that he had been "locked up" before and was "in prison" again after impregnating Victim's middle sister. Tr.p.237, p.245. Thus testimony that he "went to jail" was cumulative to his own testimony, and harmless. See State v. Kirton, 381 S.C. 7, 37, 671 S.E.2d 107, 122 (Ct. App. 2008) ("The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence."). This Court should affirm.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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